IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 134

PARAGON JEWEL COAL COMPANY, INC., *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY MEMORANDUM

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The terms of the Commissioner's opposition suggest that a few clarifying words in reply may be of assistance to the Court in its consideration of the present petition.

First. The Commissioner (Mem. Op. 3) speaks of "the clear error of the decision below", agrees (Mem. Op. 2) that *Parsons* v. *Smith*, 359 U.S. 215, "presented the same issue on substantially similar facts", and further agrees that (Mem. Op. 3) "the decision of the court of appeals is basically in conflict with *Parsons*."

Second. The Commissioner does not deny that the court below has reverted to its pre-*Parsons* position, a position wholly at variance, both in reasoning and result, with this Court's holding in *Parsons* (Pet. 11, 12-14, 16-17). Significantly enough, *Parsons* involved review and affirmance of two decisions by the Third Circuit (*Parsons* v. *Smith*,

255 F. 2d 595; *Huss* v. *Smith*, 255 F. 2d 599), in both of which certiorari was sought here on the footing of conflict with decisions of the Fourth Circuit.[1] Consequently this case involves not only the Fourth Circuit's present refusal to follow *Parsons* as written, but, what is far more disturbing, an actual reversion to its own earlier doctrines that were necessarily disapproved by this Court's *Parsons* opinion.

Third. Our assertion (Pet. 19-20) that most of the cases involving claims for depletion allowances made by coal mining contractors have arisen and will continue to arise in the Fourth Circuit is not contradicted, nor could it be, a circumstance that quite undercuts the Commissioner's bland reassurance (Mem. Op. 3) that "the present case will have precedential value only in the Fourth Circuit." For, even in situations that do not even remotely involve the disregard of this Court's decisions that is reflected here, it is ground for review that a particular industry is concentrated in a single circuit. E. g., *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50. Nor is it adequate to suggest either (Mem. Op. 3) that a subsequent conflict with another court may arise—there is presently a conflict with the Third Circuit's post-*Parsons* ruling in *Denise Coal Company* v. *Commissioner*, 271 F. 2d 930, and, far more important, an admitted (Mem. Op. 3) conflict with this Court's decision in *Parsons*—or to urge (Mem. Op. 3) that lessees and landowners should protect themselves with written contracts. For, as has been demonstrated (Pet. 13), not even an unambiguous written contract prevented the court below from disregarding *Parsons* in its *Elm Development* decision, 315 F. 2d 488.

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[1] "The decision of the Court of Appeals below is squarely in conflict with the decisions of the Court of Appeals for the Fourth Circuit" (Pet. 9, *Parsons* v. *Smith*, No. 218, Oct. T. 1958); "The decision of the Court of Appeals is in conflict with the decisions of the Court of Appeals for the Fourth Circuit" (Pet. 10, *Parsons* v. *Huss*, No. 305, Oct. T. 1958).

Fourth. The Commissioner's opposition to our petition comes to this, that since the law as to coal contractors' non-entitlement to depletion has been settled by this Court, and since it is everywhere applied—except only in the court below, where most of the cases involving that question arise (because that is where the bulk of coal mining under contract is done)—this Court should walk by on the other side while its own rulings are there disregarded.

We think that such an approach involves an inadmissible concept of judicial administration. Lower courts simply cannot be permitted to disregard this Court's rulings with impunity, least of all when such disregard involves a return to prior principles of their own that had earlier been disapproved here.

Nor should acquiescence by a public officer in (Mem. Op. 2) "the clear error of the decision below" dissuade this Court from instant corrective action now. Just as "no stipulation by the Government could circumscribe this Court's power to see that its mandate is carried out" (*United States* v. *duPont & Co.*, 366 U.S. 316, 325, note 6), so the Commissioner's rather cavalier offer of a dispensation from the duty of the court below to comply with this Court's decisions must be rejected. After all, the circumstance that the decision of a court of appeals disregards a ruling here has been a ground for certiorari ever since the principles governing the grant of the writ were first formulated.[2]

Fifth. The Commissioner suggests (Mem. Op. 3) that, "with the decision in *Parsons* having been so recently announced, there seems little reason to believe that this Court's application of its principles to the particular facts of this case[3] would add significantly to a clarification of the law in this difficult area."

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[2] Rule 35(5)(b), 266 U.S. at 681; Rule 38(5)(b), 275 U.S. at 624, 286 U.S. at 624, 306 U.S. at 718-719; Rule 19(1)(b), 346 U.S. at 967-968.

[3] Cf. Mem. Op. 2: "*Parsons* v. *Smith*, *supra*, presented the same issue on substantially similar facts."

Whether there would be utility in the promulgation of another opinion by this Court, particularly now after Congress has reinforced the rationale of the *Parsons* doctrine by legislatively fusing the depletion allowance in the case of coal (Pet. 17-19), is not for us to say. But we are convinced that it is essential to the uniform administration of the Internal Revenue Code for this Court now to indicate in emphatic fashion that principles which it has once enunciated after thorough consideration must be applied and given effect by the lower Federal courts. The present case may accordingly be one where the mere *per curiam* notation—"Judgment reversed. *Parsons* v. *Smith*, 359 U.S. 215"—would be not only appropriate, but illuminating as well. Such a course would indeed "add significantly to a clarification of the law" in an area that only continuing disregard of this Court's decisions has rendered "difficult".

The present petition for certiorari (as well as the petitions in the companion cases, *Commissioner* v. *Merritt et als.*, No. 237, and *Commissioner* v. *Cooper et al.*, No. 262) should therefore be granted.

Respectfully submitted.

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JULY 1964.